No. 82-1547

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

MARJORIE LOUISE DABNEY,
Petitioner,
v.
MONTGOMERY WARD & CO., INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

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Respondent's Brief in Opposition only underscores why a Court of Appeals should not engage, as the Eighth Circuit did below, in a retrospective, *de novo* analysis of whether a trial judge should relax a Final Pretrial Order entered under Rule 16, Federal Rules of Civil Procedure. There is no serious attempt to reconcile the Eighth Circuit's action with this Court's decisions setting the bounds of proper appellate review, or with conflicting decisions of other Circuits in witness-preclusion cases. No substantial argument is offered that the trial judge here misapplied the law or otherwise abused his

discretion; rather Respondent parses the Record selectively to support the Court of Appeals' improper substitution of its judgment for that of the District Court.[1]

1. The Record reflects that the trial judge, who had shepherded pretrial proceedings for 23 months and had most familiarity with this action, weighed carefully the competing considerations and exercised his discretion mindful of its bounds. On three separate occasions, at the beginning and end of the trial and in his Opinion denying Respondent's Motion for New Trial (Pet. App. 22a-23a, 26a, 13a-14a), he stated the pertinent factors and recorded why, on balance, these factors in this case warranted the denial of relief from the Final Pretrial Order.

When the question first arose, the trial judge noted that he would "probably" allow the witness to testify unless it was "unduly prejudicial" to Petitioner (Pet. App. 22a). He said that if the witness had been disclosed 10 days earlier, "I don't think we would have had the problem. We would have been able to go ahead . . ." (Pet. App. 23a). Later the Court reiterated that "[c]ertainly had we had prior knowledge, I would have allowed the witness list to be amended" (Pet. App. 26a), and noted Respondent's failure to disclose how long it was aware of the witness before it advised its counsel about her (Pet. App. 13a). It was the prejudice to Petitioner from the late disclosure, and Respondent's failure even to try and show the absence of inexcusable neglect, that influenced the District Court. The Court reasonably

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[1] Respondent's argument (Br. in Opp. 15-16), made for the first time in this Court, about when Petitioner filed her written list of witnesses is transparently beside the point. At no time has Respondent ever asserted that it was surprised by any of Petitioner's trial witnesses. Certainly if Petitioner had presented any "last minute" witnesses at trial, Respondent would have objected and complained of disparate treatment, and would have raised the point in the Court of Appeals. It did neither. In fact, Respondent was well aware of whom Petitioner intended to call at trial; it had been orally advised as to the witnesses before trial.

concluded that it would have been "grossly unfair" to require Petitioner to investigate this witness's testimony, and to seek and interview (and possibly depose) other witnesses or marshall other evidence to meet it, while the trial was ongoing (Pet. App. 26a). Moreover, the District Court reasonably could have concluded that all these circumstances did not warrant a continuance or other disruption of the trial.[2]

The trial judge thus announced no new rigid rule of law, as Respondent argues. He expressly stated that he was denying relief from the Final Pretrial Order "under the circumstances" presented here (Pet. App. 26a). His oral statement about the gross unfairness to Petitioner "to have this type of witness come up at such a late date, no matter what the reason for it was" (Pet. App. 26a) is emphasized out of context (*e.g.*, Br. in Opp. 13). Indeed, the District Court, who was not even told how long Respondent (not merely Respondent's counsel) knew about the witness, could reasonably have concluded that Respondent's failure to locate or disclose the witness earlier was inexcusable, even if Respondent's counsel had not acted in bad faith.

2. It is not enough merely to invoke the "abuse of discretion" standard, only to pay lip service to it. In *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257 (1981),

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[2] Recently this Court has reemphasized the substantial deference which the Court of Appeals should give to the discretion of the trial judge in such a basic matter of case management:

> "Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, *broad discretion must be granted trial courts on matters of continuances. . . .*" *Morris* v. *Slappy*, 51 U.S.L.W. 4399, 4402 (U.S. April 20, 1983) (emphasis added).

See also Rule 403, Federal Rules of Evidence.

when considering another case management matter as to which substantial deference must be given the trial court, this Court described how the Eighth Circuit deviated from this principle in this case:

> "The *forum non conveniens* determination is committed to the sound discretion of the trial court. . . . Here, the Court of Appeals expressly acknowledged that the standard of review was one of abuse of discretion. In examining the District Court's analysis of the . . . interests, however, the Court of Appeals seems to have lost sight of this rule, and substituted its own judgment for that of the District Court."

For the foregoing reasons, and for the reasons stated in the Petition, a writ of certiorari should issue to review the Judgment and Opinion of the Eighth Circuit.

Respectfully submitted,

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